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No. 95-279

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WILLIAM T. ATKINS,
Petitioner,

v.

DEPARTMENT OF REVENUE,
STATE OF OREGON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

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BRIEF OF AMICUS CURIAE TAX EXECUTIVES INSTITUTE, INC. IN SUPPORT OF PETITIONER

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BRIEF OF AMICUS CURIAE TAX EXECUTIVES INSTITUTE, INC. IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of this Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari.[1] Tax Executives Institute (hereinafter "TEI" or "the Institute") is a voluntary, non-profit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and currently has approximately 5,000 members who represent more than 2,700 of the leading businesses in the United States and Canada.

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[1] Tax Executives Institute has received the written consents of the Petitioner and Respondent to the filing of this brief; those consents have been filed with the Clerk of the Court.

The members of the Institute represent a cross-section of the business community in North America, and the companies represented by the Institute's membership are, almost without exception, engaged in interstate commerce. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws throughout the Nation, to reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers, and to vindicating the Commerce Clause, Due Process, and Equal Protection rights of all taxpayers. Our members have a significant interest in the standards to be applied with respect to state remedies for unconstitutionally collected state taxes.

This case raises fundamental questions concerning the remedies available for taxpayers who have paid state taxes that are subsequently found to contravene the Constitution. In 1989, the Court held in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), that 4 U.S.C. § 111 (1985) and the constitutional doctrine of intergovernmental tax immunity (as derived from the Supremacy Clause) prohibit the States from taxing federal annuitants more harshly than state annuitants. Four years later, in *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993), the Court held—citing *Griffith v. Kentucky*, 479 U.S. 314 (1987), and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991)—that *Davis* must be applied retroactively by all courts. And last year, in *Reich v. Collins*, 115 S. Ct. 547 (1994), the Court held that a State may not hold out what plainly appears to be a "clear and certain" post-deprivation remedy—its tax refund statute—and declare, after taxpayers have paid the disputed tax, that no such remedy exists.

This case focuses—once again—on what remedies a State may use to deny taxpayers a refund of unconstitutionally collected taxes. Specifically, the issue is whether the State of Oregon has improperly "reconfigure[d] its scheme, unfairly, in midcourse"—to "bait" taxpayers into believing that a refund remedy exists, only to "switch"

later to a cry of inapplicability. *Reich*, 115 S. Ct. at 550. More fundamentally, the case involves the effect to be given to the Court's decisions under the Supremacy Clause and the doctrine of *stare decisis* and whether the States may vitiate the constitutional protections they safeguard by arrogating to themselves the power to distinguish away those decisions on the flimsiest of grounds.

The Institute's members and the businesses by whom they are employed have no direct interest in the resolution of this case. They do, however, have a keen and vital interest in determining the remedies that must be accorded aggrieved taxpayers when a state statute is invalidated on constitutional grounds. This case promises to affect far more than the State of Oregon's or any other State's authority to retain the unconstitutional taxes they improperly collected from federal annuitants. Indeed, the very legitimacy, strength, and vitality of this Court's holdings are at issue. TEI is concerned about the deleterious effect the Oregon court's decision could have on the equitable administration of state taxing schemes, especially those relating to business taxpayers.

Because TEI members and the businesses by whom they are employed will be materially affected by the application of the Oregon court's decision, the Institute has a special interest in the outcome of this case.

SUMMARY OF ARGUMENT

The core issue in this case—whether a taxpayer who has been subjected to an unconstitutional tax levy is entitled to a refund of the illegally extracted monies—is the proverbial bad penny: It keeps turning up at the Court. The specific issue before the Court is whether the State of Oregon must refund unconstitutionally collected taxes imposed on federal retirees. In *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), this Court struck down the laws of Michigan and 22 other States that taxed the pensions of retired federal government employees while

exempting all or part of the pensions of state government retirees. Four years later, in *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993), the Court held—citing *Griffith v. Kentucky*, 479 U.S. 314 (1987), and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991)—that *Davis* must be applied retroactively by all courts. And last year, in *Reich v. Collins*, 115 S. Ct. 547 (1994), the Court held that a State may not hold out what plainly appears to be a "clear and certain" post-deprivation remedy—its tax refund statute—and declare, after taxpayers have paid the disputed tax, that no such remedy exists.

Without a remedy, taxpayer's rights are illusory and without regard. The last decade has seen an almost unprecedented number of state taxing statutes struck down as unconstitutional, including the *Davis* decision upending the States' discriminatory scheme of taxing retired federal employees. Even after the Court struck down the statutes as contravening the Constitution, some (albeit not all) States resisted efforts to refund the taxes that they had collected under the invalidated laws. That the States have moved from a constitutional argument to a plea for prospectivity to a strained construction of their remedial statutes should not obscure this basic truth: The States have funds properly belonging to taxpayers.

The States' refusal to fashion meaningful remedies was commonly rationalized on equity grounds. Although many argued that the balancing test set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), could be applied to safeguard the constitutional rights of taxpayers, experience convinced this Court that *Chevron Oil* was too pliant to be useful. Consequently, two years ago in *Harper*, this Court embraced the full retroactivity standard of *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987). It is this rule of law that the State of Oregon, by its interpretative sleight of hand, has endeavored to eviscerate.

In *Reich*, the Court clearly repudiated the State's "bait and switch" tactics and ordered meaningful backward

looking relief. 115 S. Ct. at 550-51. Nevertheless, the Oregon court refused to order a refund to the taxpayer and its refusal is precisely the type of "mischievous consequences" that the Court warned of more than a century ago in confirming the application of the Supremacy Clause to this Court's decisions. *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 253 (1867). To be sure, Oregon's defiance of *Reich* has been masked. The State cleverly sought to distinguish the case out of existence by contorting the plain meaning of Oregon's refund statute and thereby obliterating almost six decades of precedent. It is precisely the type of reconfiguration that the Court found abhorent in *Reich*. 115 S. Ct. at 550.

This Court is properly loath to impinge on the state courts' prerogative to fashion remedies after the substantive issues in the case are decided. In the past decade, however, State after State has distended this Court's holdings—on the merits, on the retroactivity question, and on the issue of remedies. The Court "cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." *Chapman v. California*, 386 U.S. 18, 21 (1967). Unless the Court reviews this case and orders meaningful relief, the States will continue to have an incentive to enact unconstitutional statutes, knowing that—at worst—they may have to mend their ways in the future.

There has been much discussion of late of the public's distrust of government and its doubts about its role, abilities, and basic integrity. More than half a decade has passed since the Court held laws like the State of Oregon's here to be unconstitutional. The States' actions in thwarting the implementation of this Court's decisions cannot help but undermine the people's trust in government and the spirit of fair play. No longer should defiance of the Court's mandates be ignored. It is time to say, once again, that the "time for toleration has come to an end." *Griffith v. Kentucky*, 479 U.S. at 323.

The Court should grant a writ of certiorari, reverse the decision of the Supreme Court of Oregon, and order the State to refund the monies it unconstitutionally extracted from Petitioner.

ARGUMENT

I.

Things without all remedy
Should be without regard: what's done is done.[2]

The core issue in this case—whether taxpayers who have been subjected to an unconstitutional tax levy are entitled to refunds of the illegally extracted monies—is the proverbial bad penny: It keeps turning up at the Court. To be sure, the taxing schemes invalidated by the Court have varied. And the focus of the Court's scrutiny has shifted from the constitutional infirmities of state statutes (under the Commerce Clause, the Due Process Clause, and the doctrine of intergovernmental immunity), to whether a holding of unconstitutionality must be given retroactive effect, to whether a State may properly deny refunds to taxpayers even after this Court has confirmed that a decision invalidating the statute applies retroactively. Nevertheless, the issue of refunds—of remedy and the practical effect to be given to a taxpayer-favorable decision on the merits—underlay all of the cases.

The specific issue the Petitioner brings to the Court is whether the State of Oregon must refund taxes imposed on federal retirees in violation of the constitutional doctrine of intergovernmental immunity and 4 U.S.C. § 111 (1985). In *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), this Court struck down the laws of Michigan and 22 other States that taxed the pensions of retired federal government employees while exempting all or part of the pensions of state government retirees. In 1993, in *Harper v. Virginia Dep't of Taxation*, 113 S. Ct.

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[2] WILLIAM SHAKESPEARE, MACBETH act 3, sc. 2, lines 10-11.

2510, 2513 (1993), the Court held—citing *Griffith v. Kentucky*, 479 U.S. 314 (1987), and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991)—that *Davis* must be applied retroactively by all courts. And last term in *Reich v. Collins*, 115 S. Ct. 547 (1994), the Court squarely addressed the issue of remedy, declaring that a State may not hold out what plainly appears to be a "clear and certain" post-deprivation remedy—its tax refund statute—and subsequently declare, after taxpayers have paid the disputed tax, that no such remedy exists. The instant case reprises the question of remedy—a question the Court no doubt thought it resolved nine months ago by declaring in *Reich* that the States may not engage in "bait and switch" tactics. *Reich*, 115 S. Ct. at 550.

Even in *Reich*, however, the question of remedy was not properly viewed as one of first impression. Taxpayers did not sue in *Davis* simply to have the Michigan statute invalidated. They sued for refunds of unconstitutionally collected taxes. Taxpayers did not sue in *Harper* simply to have the Court confirm that the decision in *Davis* applied retroactively in the Commonwealth of Virginia. They sued for refunds of unconstitutionally collected taxes. And taxpayers did not sue in *Reich* simply to have the Court declare that "bait and switch" policies would not be tolerated in Georgia. They sued for refunds of unconstitutionally collected taxes.

Without a remedy, taxpayers' rights are illusory and without regard. Hence, from the outset taxpayers have been seeking the refund of what the States improperly took from them, and the States have said "what's done is done" and sought to retain that which the Court has held they had no right to take in the first instance. That the States have moved from a constitutional argument to a plea for prospectivity to a strained construction of their remedial statutes (and an extraordinarily narrow and pernicious view of the effect to be given to this Court's decisions) should not obscure this basic truth: The States have funds properly belonging to taxpayers. And that basic truth

should impel the grant of a writ of certiorari, the reversal of the court below, and a judgment ordering that a refund be made to the Petitioner.[3]

II.

History is no more than the portrayal of crimes and misfortunes.[4]

The last decade has seen an almost unprecedented number of state taxing statutes struck down as unconstitutional, including the *Davis* decision upending the States' discriminatory scheme of taxing retired federal employees.[5] In many ways these cases are dissimilar. They involved different types of statutes (though with the exception of *Davis*, they all implicated the Commerce Clause rights of interstate businesses). But there are two attributes they generally share. First, they involved a finding by this Court that the State had violated the Constitution in collecting a tax that was not imposed (or not imposed to the same extent) on a favored class of tax-

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[3] *See Carpenter v. Shaw*, 280 U.S. 363, 369 (1930) ("a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment."); *accord Reich*, 115 S. Ct. at 550.

[4] VOLTAIRE [FRANÇOIS MARIE AROUET], L'INGÉNU ch. 10 (1767).

[5] *See, e.g., Armco Inc. v. Hardesty*, 467 U.S. 638, 645-46 (1984) (West Virginia's business and occupation tax); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273 (1984) (Hawaii's exemption of local products from the liquor excise tax); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 882-83 (1985) (Alabama's tax on foreign insurers); *Tyler Pipe Indus. v. Washington Dep't of Revenue*, 483 U.S. 232, 248 (1987) (Washington's business and occupation tax); *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 286-87 (1987) (Pennsylvania's highway use tax); and *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 45-46 (1990) (Florida statute exempting local products from liquor excise tax). *See also James B. Beam Distilling Co.*, 501 U.S. at 532 (involving the retroactivity of a case striking down a Georgia statute).

payers (be they domestic businesses or state annuitants). Secondly, each of them triggered the same reaction by one or more of the States that imposed the unconstitutional taxes: an effort to avoid the consequences of their unconstitutional acts, either by applying the Court's holdings on a prospective-only basis or by construing the States' refund statutes to render pyrrhic the taxpayers' constitutional victory. Hence, even after the Court struck down the statutes as contravening the Constitution, some (albeit not all) States resisted efforts to refund the taxes that they had collected under the invalidated laws.

The States' refusal to pay refunds—or to fashion other meaningful remedies for taxpayers who have suffered the unconstitutional wrongs—was commonly rationalized on equity grounds. Before *Harper,* the States essentially argued that the statutes at issue had been enacted in good faith, that the monies collected under those discriminatory statutes had already been spent, and that the issuance of refunds would threaten the fiscal well-being of the States. In reaching this result, the States generally employed the balancing test set forth in *Chevron Oil Co. v. Huson,* 404 U.S. 97, 106-07 (1971), which focused on whether the decision established a new principle of law; whether, based on the history of the rule in question, its purpose, and effect, the nonretroactive application would advance or retard the operation of the new rule; and whether nonretroactive application was necessary to avoid injustice or hardship.

In *Harper,* however, the Court concluded that the *Chevron Oil* framework was too pliant to safeguard the constitutional rights of taxpayers. Experience taught that many States would not apply the test in an even-handed manner, and hence, that the results were neither fair nor defensible. In their quest for revenue, the States transmogrified the *Chevron Oil* test into a standard so malleable that virtually all rulings of unconstitutionality could be applied, at a State's choosing, on a prospective-only

basis. The cumulative effect of the States' actions prompted the Court in *Harper* to discard *Chevron Oil* in favor of a more absolute standard that more fully vindicated the rights of taxpayers and better served the goal of certainty. Hence, this Court embraced its earlier statement in *Griffith v. Kentucky*, 479 U.S. 314 (1987), that "[t]he time for toleration has come to an end." *Id.* at 323 (*quoting United States v. Johnson*, 457 U.S. 537, 555-56 n.16 (1982)). *Griffith* holds that new rules for the conduct of criminal prosecutions must apply retroactively to all pending or non-final cases, even if they constitute a "clear break" with the past. 479 U.S. at 328. And in *Harper*, the Court extended the rule to civil cases, unequivocally holding that a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law. 113 S. Ct. at 2513. It is this rule of law that the State of Oregon, by its interpretative sleight of hand, has endeavored to eviscerate.

III.

No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it.[6]

Recitation of *Davis* and *Harper* may seem inapt, or unnecessary, in light of the Court's decision last term in *Reich v. Collins*, 115 S. Ct. 547 (1994). In that case, the Court held that a State may not "reconfigure its scheme, in midcourse"—to "bait" taxpayers into believing that a refund remedy exists, only to "switch" later to a cry of inapplicability. Playing "gotcha" with taxpayers is not consonant with due process. States must treat their citizens fairly; they may not lull them into paying a tax—believing that a "clear and certain" post-deprivation remedy exists, in the form of a tax refund

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[6] *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

statute—only to declare after those taxes have been paid that no such remedy exists. *See* 115 S. Ct. at 550.

By clearly repudiating the State's "bait and switch" tactics and by ordering "meaningful backward-looking relief" in *Reich*, 115 S. Ct. at 550-51, the Court presumably put *Davis* and its progeny behind it.[7] Such an expectation of calmer waters would not have been unrealistic, given the clarity of *Davis*, *Harper*, and *Reich* and the dictates of the Supremacy Clause. *See Hutto v. Davis*, 454 U.S. 370, 375 (1982) (it is for the Supreme Court to prescribe constitutional standards, and the lower courts are obliged to adhere to those standards "no matter how misguided the judges of those courts may think [them] to be."); *accord Cooper v. Aaron*, 358 U.S. 1, 18 (1958). Nevertheless, the Oregon court refused to order a refund to the taxpayer and its refusal is precisely the type of "mischievous consequences" that the Court warned of more than a century ago in confirming the application of the Supremacy Clause to this Court's decisions. *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 253 (1867).

To be sure, Oregon's defiance of *Reich* has been veiled. The State did not stand at the door of the revenue department, invoking memories of Orval Faubus and George Wallace. No, it reached its decision in a much more subtle, clever way. The State sought to distinguish *Reich* out of existence.

Like the Georgia law at issue in *Reich*, the Oregon refund statute here is not difficult to read. It plainly states that—

> [I]f a person files a claim for refund of any tax paid to the department under [Oregon's income tax laws] within the period specified in subsection (2), any

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[7] This assumption may well have contributed to the Court's refusal to review other cases involving *Davis*, *Harper*, and *Reich* fact patterns. *See, e.g. Swanson, v. North Carolina*, 115 S. Ct. 662 (1994).

> excess tax paid shall be refunded by the department with interest as provided in this section and ORS 314.415.[8]

The Oregon court facilely held that this provision did not apply, relying instead on an obscure section of the Oregon Code that by its terms applies only "if there is no other statute authorizing refund [of tax]."[9] It distinguished *Reich* by simply noting that the Oregon statute has been the law of the State since 1931. (App. A, 18a.) This feat of legerdemain effectively wiped out almost six decades of precedent.[10] It is precisely the type of reconfiguration—and disingenuousness—that the Court found abhorrent in *Reich*. 115 S. Ct. at 550.

Stated bluntly, like the State in *Reich*, Oregon here endeavors to shoehorn the taxpayer into a refund scheme that, by its very terms, will deny him relief. The court below parsed Oregon's omnibus refund statute and analyzed the other provisions of the Oregon Revised Statutes, not in search of principle or justice, but for a loophole. It sought not to implement the Court's mandate in *Beam*, *Davis*, *Harper*, and *Reich*, but to emasculate it. That the court below's action might pass muster under federal due process principles truly beggars the imagination.[11]

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[8] Or. Rev. Stat. § 305.270(1), *reprinted at* Appendix E to William T. Atkins' Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon (App.) at 33a.

[9] Or. Rev. Stat. § 305.765, *reprinted at* App. E, 41a-42a.

[10] The use of the omnibus refund statute by victims of unconstitutionally levied taxes dates back to the 1930s, *see e.g.*, *Meredith v. State Tax Comm'n*, 96 P.2d 1082 (Ore. 1939), and continued through most of the 1980s, *Borg v. Department of Revenue*, 774 P.2d 1099 (Ore. 1989). The courts' interpretation of the predecessor of section 305.270 of the Oregon statutes has also been embraced for more than five decades by the State's Attorney General. Opinion of the Attorney General, January 24, 1940 (App. F, 43a).

[11] *See McKesson*, 496 U.S. at 39 (if a tax is beyond the State's power to impose, the State has no choice but to "undo" the un-

Oregon's refusal to give weight to the decision in *Reich* can be instructively compared with the Virginia Supreme Court's analysis of the same decision in *Harper v. Virginia Dep't of Taxation*, No. 940326 (Va. S. Ct. Sept. 15, 1995) (*Harper III* [12]). After this Court's 1993 decision in *Harper*, the case was remanded to the Virginia courts "to provide relief consistent with federal due process principles." *Harper*, 113 S. Ct. at 2519 (*quoting American Trucking Ass'ns v. Smith*, 496 U.S. 167, 181 (1990)). The Virginia Department of Taxation argued that the Commonwealth's declaratory judgment proceeding satisfied the demands of due process and hence that Virginia was not required to provide any backward-looking relief in the form of refunds, and it persisted in this argument even after the decision in *Reich*. Indeed, the Department averred before the Virginia Supreme Court that *Reich* was inapplicable, baldly claiming that "[n]o reasonable taxpayer can claim he was misled by the clear and unequivocal language of [Virginia's] discretionary [refund] statute." *Harper III*, slip op. at 11.

The Virginia Supreme Court, however, refused to be a party to the Department's effort to minimize the decision in *Reich*. Hence, the court held:

> If . . . we now adopt, for the first time, the Department's view that a refund is discretionary, we certainly will have done what the Supreme Court said

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lawful deprivation by making refunds "because allowing the State to 'collect these unlawful taxes by coercive means and not incur any obligation to pay them back . . . would be in contravention of the Fourteenth Amendment.'" (*quoting Ward v. Board of Comm'rs of Love County*, 253 U.S. 17, 24 (1920)).

[12] The Virginia Supreme Court's September 15, 1995, decision is hereinafter denominated "*Harper III*" in recognition of that court's labeling of this Court's 1993 decision as "*Harper II*" and its 1991 summary disposition of the case in light of the decision in *Beam* as "*Harper I*." *See Harper v. Virginia Dep't of Taxation*, 501 U.S. 1247 (1991). Throughout this brief, the Court's 1993 decision on the merits is referred to as "*Harper*."

> in *Reich* a state may *not* do, that is "to reconfigure its scheme, unfairly, in *midcourse*—to 'bait and switch.' "

Slip op. at 11 (*quoting Reich*, 115 S. Ct. at 550) (emphasis added by Virginia Supreme Court).[13] The court similarly rejected the Department's attempt to deny refunds on the grounds that adequate predeprivation remedies existed. Finding that "no reasonable taxpayer would have thought that . . . [any such procedures] represented the exclusive remedy," the court held that their existence (even if constitutionally adequate) would be " 'entirely beside the point (and thus error).' " *Id.* at 15-16 (*quoting Reich*, 115 S. Ct. at 550). Hence, the Virginia Supreme Court concluded:

> Giving *Reich* its full effect, we reach the inevitable conclusion that the *Harper* taxpayers are entitled to full refunds.

Id. at 17.

The parallels between the Virginia Department of Taxation's actions in *Harper III* and State of Oregon's actions here are striking. The difference, however, is that whereas Oregon's resistance continues unabated, in Virginia the third time was the charm. After denying the constitutional necessity of refunds in the aftermath of *Davis* and *Harper*, the Virginia Supreme Court in *Harper III* interpreted *Reich* as this Court intended: as an unmistakable signal to end beguiling games of semantics and to give full effect to this Court's decisions. It is a signal the State of Oregon still refuses to heed.

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[13] The Department of Taxation argued that the interpretation of the refund statute it was propounding was not new. The court, however, found unpersuasive the Department's efforts to distinguish away a 1916 case that interpreted similar language as *mandating*, rather than simply authorizing, the refund of illegally collected taxes. Slip op. at 11-15 (interpreting the word "may" in the tax refund statute as mandatory is necessary "[t]o avoid doing what *Reich* teaches a state may not do").

IV.

> *There simply is nothing "inequitable" or wrong about ordering that the State not pick a taxpayer's pocket or in requiring it to return the money when it is caught doing so.*[14]

This Court is properly loath to impinge on the state courts' prerogative to fashion remedies after the substantive issues in the case are decided. *See National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 115 S. Ct. 2351, 1995 U.S. LEXIS 4049, at *7 (U.S. June 19, 1995) ("principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration."). *Reich* stands for the proposition, however, that the States' remedial discretion is not unfettered, especially where that discretion has been repeatedly abused. History is irrefutable: In the past decade, State after State has distended this Court's holdings—on the merits, on the retroactivity question, and now on the issue of remedies—in order to eviscerate the protections accorded taxpayers by the Constitution.

Two centuries ago, the Framers recognized the need for the federal courts to vigilantly safeguard rights against the parochialism of the States. In *The Federalist No. 80*, Alexander Hamilton used the example of claims to land under grants of different States to underscore the need for diversity jurisdiction:

> The courts of neither of the granting states could be expected to be unbiassed. The laws may have even prejudged the question, and tied the courts down to decisions in favour of the grants of the state to which they belonged. And even where this had not been done, it would be natural that the

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[14] *Swanson v. North Carolina*, 407 S.E.2d 791, 797 (N. C. 1991) (Mitchell, J., dissenting).

> judges, as men, should feel a strong predilection to the claims of their own government.

THE FEDERALIST No. 80 (Alexander Hamilton), *reprinted in* II THE DEBATE ON THE CONSTITUTION 476, 479-80 (Library of America 1993). Justice Story elaborated in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816):

> The constitution has presumed (whether rightly or wrongly, we do not inquire), that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice.[15]

See John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 22-28 (1948) (diversity jurisdiction was the product in part of "[t]he desire to avoid regional prejudice against commercial litigants, based in small part on experience and in large part on common-sense anticipation.").

To be sure, the insularity of the States has generally tempered over the years, and the concerns that led to the development of diversity jurisdiction are not wholly present here.[16] Nevertheless, the principle remains the same: The Court "cannot leave to the States the formulation of the authoritative laws, rules, *and remedies designed to protect people from infractions by the States of federally*

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[15] *See* THE FEDERALIST No. 81 (Alexander Hamilton), *reprinted in* II THE DEBATE ON THE CONSTITUTION, *supra*, 483, 487-88 ("The most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes . . .").

[16] Indeed, although many of the cases coming before the Court in recent years have involved the Commerce Clause rights of out-of-state businesses, here it is the citizens of the State—albeit ones formerly employed by the Federal Government—who are denied their rights.

guaranteed rights." Chapman v. California, 386 U.S. 18, 21 (1967) (emphasis added).

It is time for the Court to end its willing suspension of disbelief concerning the States' ability and willingness to flout the constitutional rights of taxpayers. For far too long, State after State has adopted what can be described as a "heads I win, tails you lose" approach to cases implicating the constitutional rights of taxpayers. If a State prevails in litigation and the challenged statute is sustained, all taxpayers (rightfully) lose. But if a State loses and the statute is found to be constitutionally deficient, the State should not be allowed to argue first that the decision should apply on a prospective-only basis, and then (when that argument fails under *Beam* and *Harper*) insist that, though retroactive, the decision does not necessitate refunds (even where *Reich* mandates otherwise). The States should not be permitted to thwart the judgments of this Court by conjuring up one excuse after another for refusing to return to taxpayers what the States had no right to take in the first instance. Unless the Court orders meaningful relief in this and similar cases, the States will continue to have an incentive to enact unconstitutional statutes—to "roll the dice" with the constitutional rights of taxpayers, knowing that—at worst—they may have to mend their ways in the future.[17] Indeed,

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[17] That the States' approach in the cases invalidating state taxing schemes is driven more by their desire to avoid responsibility for their unconstitutional acts than by a reasonable interpretation of this Court's decisions is perhaps best illustrated by a case in which the roles of taxpayers and the States on the retroactivity issue were reversed from what they typically have been. In *Allied-Signal, Inc. v. Director, Div. of Taxation,* 504 U.S. 768 (1992), the Court considered whether two earlier decisions—*ASARCO Inc. v. Idaho State Tax Comm'n,* 458 U.S. 307 (1982), and *F.W. Woolworth Co. v. Taxation & Revenue Dep't,* 458 U.S. 354 (1982)—should be overruled. Had those cases been overturned, the States would have been free to tax a larger share of the income of out-of-state busi-

allowing Oregon's defiance of *Harper* and *Reich* to stand here could jeopardize the integrity of the certiorari process, by encouraging States to disregard decisions they disagree with in the knowledge that the odds are high against this Court's reviewing the decision. That such an outcome cannot be lightly dismissed is underscored by Oregon's seemingly flippant decision not to respond to the Petition.

V.

The time for toleration has come to an end.[18]

There has been much discussion of late of the public's distrust of government and its doubts about its role, abilities, and basic integrity. Some trace the people's cynicism of government's trustworthiness to the Vietnam War and the arrogance of power that was documented in the Penta-

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nesses, and the Court invited briefs on whether any such overruling should be retroactive. Although the case would have involved the overruling of express and directly applicable Supreme Court precedent of less than ten years' duration (which itself relied on an unbroken chain of Supreme Court decisions dating back to 1875)—and notwithstanding the States' almost uniform resistance to retroactive holdings where taxing schemes have been invalidated—29 States, the District of Columbia, Guam, and the Virgin Islands filed a brief unabashedly arguing that "the *Chevron Oil* test can accommodate both an overruling decision and a holding of retroactivity." *See* Brief by Alabama, Arizona, Arkansas, Colorado, District of Columbia, Florida, Georgia, Guam, Hawaii, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Texas, Utah, Virgin Islands, Virginia, Washington, West Virginia, Wisconsin, and Wyoming as Amici Curiae in Support of Respondent, *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768 (1992) (No. 91-615) at 16. Such an "accommodation," however, which some States seem ready to carry over to the issue of remedy, seems completely untethered by principle or consistency. As the Fifth Circuit observed in *Kurzner v. United States*, 413 F.2d 97, 112 (5th Cir. 1969), "the courts have not yet become so cynical as to subscribe to the tax-dollar school of statutory construction."

[18] *Griffith v. Kentucky*, 479 U.S. at 323 (*quoting United States v. Johnson*, 457 U.S. 537, 555-56 n.16 (1982)).

gon Papers, which came before the Court in *New York Times Co. v. United States*, 403 U.S. 713 (1971). Others point to the Watergate crisis, and to the excesses that the legal process was called to judge in *United States v. Nixon*, 418 U.S. 683 (1974). More recently, some have focused on a courtroom in Los Angeles where the law seems twisted out of shape; they listen to tapes—not at all like those at issue in *United States v. Nixon* but nevertheless involving a person sworn to uphold the Constitution—and they hear documented the violation of that sacred oath.

There are no tapes here, no smoking gun. There are just the actions of a series of state courts interposing their own will and denying what is due to a class of citizens unconnected by anything but service to their government. There are just beguiling interpretations of state law, distended readings of the Constitution, and facile efforts to vitiate this Court's mandates. The States' actions, however, cannot help but undermine the people's trust in government and the spirit of fair play, no matter how prettily they are wrapped. Like the Emperor in Hans Christian Andersen's fairy tale, the nakedness—and arrogance—of their actions has been exposed for all to see. It should now be stopped.

This case, then, is about more than Petitioner's entitlement to the tax dollars the State of Oregon illegally exacted from him. It is about the legitimacy and vitality of this Court's decisions. To be sure, the States may pay lip service to *Davis*, *Harper*, and *Reich*, but in reality they have shown a brazen disregard for the Supremacy Clause, and an unbending willingness to thwart the directives of this Court and undermine the protections of the Constitution:

- They disagreed with *Davis* and so they undertook to stymie its effect.
- They disagreed with *Harper* and so they undertook to circumscribe it.

- They disagreed with *Reich* and so they undertook to ignore it.

No longer should their defiance of the Court's mandates be countenanced. It is time for this Court to say, *Enough is enough*. It is time to reject the States' massive resistance, their effort to treat taxpayers' constitutional rights as unwelcome guests at a dinner party, thinking that if they simply ignore them, they will go away. It is time to say, once again, that the time for toleration has come to an end.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari, reverse the decision of the Supreme Court of Oregon, and order the State to refund the monies it unconstitutionally extracted from the Petitioner.

Respectfully submitted,

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